# Sarah bt Abdullah @ Hew Lee Ling (p) v Kwok Peck Wah (p) & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–162 OF 1999
DENIS ONG, ABDUL AZIZ MOHAMAD AND TENGKU BAHARUDIN SHAH JJCA
28 JULY 2009

*Succession — Probate — Validity of will — Petition for probate dismissed — Appeal against — Whether trial judge erred in finding that deceased did not have testamentary capacity to execute will — Whether there were suspicious circumstances surrounding making of will*

The appellant petitioned for probate of the will of her late father made on 29 January 1993 ('the said will') after his death on 29 March 1993. The deceased's son Hew Chee Keong ('Keong') and his alleged adopted daughter Kwok Pek Wah ('the first respondent'), who was in fact the adopted daughter of the deceased's wife, objected to the petition. The first respondent and Keong each filed affidavits claiming that the said will was not the will of the deceased and/or it was executed by the deceased under fraudulent circumstances and/or involuntarily. When Keong passed away before the trial he was substituted by his son ('the second respondent') representing himself and his two siblings. The deceased had previously executed in his own hand three other wills, two in 1988 and one other in 1992. In both the 1988 wills the deceased had, because of a misunderstanding with Keong, left him with a beneficial interest of RM500 from his estate but provided for Keong's children. The first respondent who was described in the two 1988 wills as the deceased's daughter was described as his step daughter in the said will. The 1992 will was executed after the deceased was diagnosed with nose cancer sometime between April and May 1992. On 8 January 1993, the deceased had been admitted to the hospital after a mild stroke. During his stay in the hospital from 8 January 1993 to 18 January 1993 he was treated for hypertension and diabetes. He was again readmitted to the hospital on 28 January 1993 for constipation and an inability to pass urine when he executed the said will. The physician attending to the deceased ('the doctor') testified that the deceased was conscious, not suffering from any memory loss and able to speak unaided on 29 January 1993 and that the four medications prescribed to him did not affect the state of his mind. The said will was prepared by a lawyer on the petitioner's instruction and executed by the deceased using his right thumbprint in the presence of two witnesses. After

evaluating the evidence the High Court came to the conclusion that the deceased did not have the testamentary capacity to make the said will. The said will was therefore declared invalid and the petition was dismissed with costs. This was the appellant's appeal against that decision. In her appeal the appellant contended that the trial judge had erred in finding that the deceased did not have the testamentary capacity to execute the said will and that there were suspicious circumstances surrounding the making of the said will. The appellant submitted that the trial judge had totally failed to consider the unchallenged evidence of the deceased's doctor.

**Held**, allowing the appeal with costs here and below:

(1) There was no dispute that the deceased was unwell, but the unchallenged evidence of the deceased's doctor showed that the medication given to the deceased did not affect his mental capacity to make a will. His testimony that the deceased was discharged after receiving treatment to stabilise his stroke, hypertension and diabetes was not challenged. As such there was merit in the appellant's submission that the trial judge had totally failed to consider the unchallenged evidence of the deceased's doctor. There was clear misappreciation of evidence relating to the deceased's mental condition at the time of the execution of the said will. In addition, the two attesting witnesses also found the deceased to be normal at the time when he executed the said will. The testimonies of these three witnesses apart from the appellant's coupled with the evidence of the deceased's caregiver, who was nursing him after his discharge from the hospital, provided unchallenged evidence that the deceased was of sound mind, memory and understanding and that he approved and had knowledge of the contents of the said will. Thus, the trial judge's finding on the deceased's testamentary capacity is untenable and in fact contrary to the evidence and necessitated appellate interference (see paras 15, 17, 22–23).

(2) The trial judge's findings that the petitioner was the prime mover of the execution of the will and that her acts and conduct constituted suspicious circumstances were also based on his misappreciation of the facts adduced in evidence. From the contemporaneous documents executed by the deceased, it was apparent that he reacted to events that affected his personal life. The chronology of events leading to the execution of the said will allayed any suspicion that it was not executed by the deceased voluntarily and with full understanding of its contents. He made his will and changed it when he felt the need to do so. In the circumstances the appellant was neither the prime mover of the

execution of the said will nor the person who took a substantial benefit under it but was merely abiding by the deceased's specific instructions (see paras 27–28 & 33).

(3) Although the issues raised for consideration in this appeal concerned findings of fact and the appellate court will not readily interfere with such findings, the whole evaluation of evidence by the trial judge was totally flawed and the decision of the trial judge could not be upheld. As such, there was no cause for probate to be denied and appellate interference was necessary to rectify the error (see para 37).

**[Bahasa Malaysia summary**

Perayu mempetisyen untuk probet wasiat mendiang ayahnya yang dibuat pada 29 Januari 1993 ('wasiat tersebut') selepas kematiannya pada 29 Mac 1993. Anak lelaki si mati Hew Chee Keong ('Keong') dan anak angkat perempuannya Kwok Pek Wah ('responden pertama'), yang sebenarnya merupakan anak angkat kepada isteri si mati, membantah petisyen tersebut. Responden pertama dan Keong masing-masing memfailkan afidavit-afidavit mendakwa bahawa wasiat tersebut bukanlah wasiat si mati dan/atau ditandatangani oleh si mati di bawah keadaan fraud dan/atau tanpa rela hati. Apabila Keong meninggal dunia sebelum perbicaraan dia digantikan dengan anak lelakinya ('responden kedua') mewakili dirinya dan dua orang adik-beradiknya. Sebelum ini si mati telah menandatangani tiga wasiat yang lain, dua pada 1988 dan satu lagi pada 1992. Dalam kedua-dua wasiat 1988 si mati, disebabkan oleh satu perselisihan faham dengan Keong, telah memberikannya faedah benefisial RM500 daripada harta pusakanya tetapi membuat peruntukan untuk anak-anak Keong. Responden pertama yang diperihalkan sebagai anak si mati dalam dua wasiat tahun 1988 telah diperihalkan sebagai anak tirinya dalam wasiat tersebut. Wasiat 1992 ditandatangani selepas si mati didiagnosis dengan kanser hidung sekitar bulan April dan Mei 1992. Pada 8 Januari 1993, si mati telah dimasukkan ke hospital selepas strok ringan. Sewaktu dia berada di hospital pada 8 Januari 1993 sehingga 18 Januari 1993 dia dirawat untuk hipertensi dan kencing manis. Dia kemudiannya dimasukkan semula ke hospital pada 28 Januari 1993 kerana sembelit dan tidak dapat membuang air kecil apabila dia menandatangani wasiat tersebut. Pakar perubatan yang merawat si mati ('doktor') memberi keterangan bahawa si mati sedar, tidak mengalami hilang ingatan dan boleh bercakap tanpa bantuan pada 29 Januari 1993 dan bahawa keempat-empat ubat yang dipreskripsikan kepadanya tidak menjejaskan keadaan akal fikirannya. Wasiat tersebut disediakan oleh seorang peguam atas arahan pempetisyen dan ditandatangani oleh si mati dengan menggunakan cap jari kanan dengan kehadiran dua orang saksi. Selepas menilai keterangan tersebut, Mahkamah Tinggi membuat kesimpulan bahawa si mati tidak mempunyai keupayaan perwasiatan untuk membuat wasiat tersebut. Oleh itu

wasiat tersebut diisytiharkan tidak sah dan petisyen tersebut ditolak dengan kos. Ini merupakan rayuan perayu terhadap keputusan tersebut. Dalam rayuannya perayu menghujah bahawa hakim perbicaraan telah khilaf dalam dapatannya bahawa si mati tidak mempunyai keupayaan perwasiatan untuk menandatangani wasiat tersebut dan bahawa terdapat keadaan meragukan mengenai wasiat yang dibuat. Perayu menghujah bahawa hakim perbicaraan gagal untuk mempertimbangkan keterangan tidak dicabar oleh doktor si mati.

**Diputuskan**, membenarkan rayuan dengan kos di Mahkamah ini dan di Mahkamah Tinggi:

(1) Tiada pertikaian bahawa si mati tidak sihat, tetapi keterangan tidak dicabar oleh doktor si mati menunjukkan bahawa ubat yang diberikan kepada si mati tidak menjejaskan kapasiti mentalnya untuk membuat wasiat. Kenyataannya bahawa si mati telah dibenarkan keluar selepas menerima rawatan untuk menstabilkan strok, hipertensi dan kencing manis tidak dicabar. Oleh itu terdapat merit dalam hujahan perayu bahawa hakim perbicaraan gagal untuk mempertimbangkan keterangan tidak dicabar oleh doktor si mati. Jelas terdapat keterangan yang tidak dinilai mengenai keadaan mental si mati pada masa wasiat tersebut ditandatangani. Tambahan pula, saksi yang memberi akuan juga mendapati si mati berkeadaan normal pada masa dia menandatangani wasiat tersebut. Kenyataan-kenyataan ketiga-tiga saksi selain daripada perayu disertakan dengan keterangan penjaga si mati, yang merawatnya selepas dia dibenarkan keluar dari hospital, memberikan keterangan tidak dicabar bahawa si mati sempurna akal, ingatan dan memahami dan bahawa dia membenarkan dan mempunyai pengetahuan mengenai isi kandungan wasiat tersebut. Oleh itu, dapatan hakim perbicaraan ke atas keupayaan perwasiatan si mati tidak dapat dikekalkan dan jelas bercanggah dengan keterangan dan memerlukan campur tangan mahkamah rayuan (lihat perenggan 15, 17, 22–23).

(2) Dapatan hakim perbicaraan bahawa pempetisyen merupakan penggerak utama penyempurnaan wasiat tersebut dan bahawa perbuatan dan tindakannya menimbulkan keadaan meragukan juga berdasarkan fakta dalam keterangan yang tidak dinilai. Daripada dokumen-dokumen yang ditandatangani sebelumnya oleh si mati, jelas bahawa dia bertindak terhadap peristiwa yang menjejaskan kehidupan peribadinya. Kronologi peristiwa-peristiwa yang membawa kepada penyempurnaan wasiat tersebut menghapuskan keraguan bahawa ianya tidak ditandatangani oleh si mati secara rela hati dan dengan memahami sepenuhnya isi kandungannya. Dia membuat wasiat dan mengubahnya apabila dia merasakan terdapat keperluan berbuat

demikian. Dalam keadaan tersebut perayu bukanlah penggerak utama penyempurnaan wasiat tersebut ataupun orang yang mendapat faedah yang banyak di bawah wasiat tersebut tetapi hanyalah orang yang mematuhi arahan-arahan terperinci si mati (lihat perenggan 27–28 & 33).

(3) Walaupun isu-isu yang dikemukakan untuk dipertimbangkan dalam rayuan ini mengenai dapatan fakta dan mahkamah rayuan tidak bersedia untuk campur tangan dalam dapatan tersebut, keseluruhan penilaian keterangan oleh hakim perbicaraan adalah cacat dan keputusan hakim mahkamah perbicaraan tidak boleh disahkan. Oleh itu, tiada sebab untuk probet tersebut dinafikan dan campur tangan mahkamah rayuan perlu untuk membetulkan kesalahan tersebut (lihat perenggan 37).]

**Notes**

For cases on validity of will, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2585–2593.

**Cases referred to**

*Battan Singh v Amirchand* [1948] 1 All ER 152, PC (not folld)
*Bohrmann, Caesar and Watmough, In The Estate of v Bohrmann* [1938] 1 All ER 271 (refd)
*Judah v Isolyne Bose* AIR 1945 PC 174 (folld)
*Lee Tjin Nam v Lie Chin Man* [1996] 1 CLJ 82, HC (refd)
*Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395, CA (refd)
*Tho Yow Pew & Anor v Chua Kooi Hean* [2002] 4 MLJ 97; [2002] 4 CLJ 90, CA (refd)
*Udham Singh v Indar Kaur* [1971] 2 MLJ 263, FC (refd)

**Legislation referred to**

Wills Act 1959 s 5

**Appeal from**: Petition No 32–70 of 1993 (High Court, Shah Alam)

*R Ganapathi (Achan & Co) for the appellant.*
*Sathia Stella (Selva Balan with her) (Zarina GT Vanan & Associates) for the respondents.*

**Tengku Baharudin Shah JCA (delivering judgment of the court):**

**[1]** The appellant's ('the petitioner's') appeal is against the decision of the learned judge of the High Court in Shah Alam, after a full trial, dismissing her petition for probate of the will ('the said will') of her late father Hew Wai

Kwong ('the deceased') made on 29 January 1993. The deceased died two months later on 29 March 1993. The petition was objected to by the deceased's son Hew Chee Keong ('the father of the second respondent') and the deceased's alleged adopted daughter Kwok Pek Wah ('the first respondent') who each filed a caveat and later their respective affidavits stating similar grounds that the said will was not the will of the deceased and/or alternatively that it was executed by the deceased under fraudulent circumstances and/or involuntarily and/or without understanding its contents.

**[2]** Hew Chee Keong passed away before trial and was substituted by his son the second respondent representing himself and his two siblings.

**[3]** We allowed the appeal with costs here and below and set aside the order of the High Court dated 27 January 1999. We granted probate of the said will to the petitioner. Being the only remaining member of the court as my brothers Denis Ong Jiew Fook JCA and Abdul Aziz bin Mohamad JCA (as he then was) have since retired I now state our reasons.

THE WILL

**[4]** The said will was executed by the deceased when he was at Tung Shin Hospital, Kuala Lumpur. He was admitted to the hospital after a mild stroke and was treated there for hypertension and diabetes from 8 January 1993 to 18 January 1993. He was readmitted on 28 January 1993 for constipation and inability to pass urine and was discharged on 30 January 1993. According to the attending physician PW4 the deceased was conscious and able to speak unaided on 29 January 1993. The four medications prescribed to him did not affect the state of his mind which was sound. Neither did he suffer any loss of memory. The said will was prepared by a lawyer PW5 on the petitioner's instruction and executed by the deceased using his right thumbprint in the presence of two witnesses PW2 a teacher and PW3 a bank manager. On the petitioner's request the same day PW4 also made a written memo to the effect that the deceased was of sound mind.

**[5]** It was not disputed that the deceased had previously executed in his own hand three other wills, two before the same solicitor in 1988 and another before PW5 in 1992. Hew Chee Keong apparently had some misunderstanding with his parents in 1988 and both the 1988 wills only left him with a beneficial interest of RM500 of the deceased's estate but his children were provided for. The first respondent who was described by the deceased as his daughter in both 1988 wills and as step daughter in the said will is in fact the pre-married adopted daughter of the deceased's wife Kwok Suet Yu who died in October 1992. It is pertinent to note that the deceased

was between April and May 1992 taken to the same hospital and diagnosed with nose cancer. And the 1992 will was executed in July 1992. After his wife's death the deceased also executed a power of attorney empowering the petitioner to deal with all his assets and properties.

**[6]** In early January 1993 the deceased was also undergoing acupuncture treatment. Upon the deceased's discharge from hospital he wanted to continue with the acupuncture treatment in Subang Jaya and the first respondent's favour was sought to allow him to stay in her house at Sea Park for five days for the purpose. It was alleged that the first respondent's refusal (which she denied) upset the deceased and made him angry. Not long after that the deceased gave the petitioner instructions to prepare the said will.

**[7]** The first respondent contended that the deceased upon discharge on 18 January 1993 was frail, bedridden and helpless and was unable to feed himself. She denied refusing to allow the deceased to stay at her house saying that she only asked for someone to assist her as she could not manage him alone because he was helpless. She denied that he was angry with her as he did not resent her when she visited him after the 1993 Chinese New Year. She contended that there was a proposal to send the deceased to a nursing home but it was found to be too expensive. The deceased finally returned to his house with his adopted daughter DW4 paid by the petitioner and her sister Hew Lee Choo to look after him during the day.

## FINDINGS OF THE HIGH COURT

**[8]** The learned judge after evaluating the evidence before him came to 'an irresistible conclusion' that the deceased did not have the necessary testamentary capacity to make the said will on 29 January 1993. He based his conclusion on the specific findings he made on the evidence. This is what he said:

> The fact which was most pertinent to the issue of the testator's testamentary capacity is that the will was executed on the hospital bed on which the testator was lying on 29 January 1993, when the testator developed an inability to pass urine. Various medicines were prescribed for diabetes, high blood pressure and blood circulation in the brain of the testator. At all material times ie for two days viz on 28 January 1993 to 30 January 1993, the testator was given diabetic diet. Meanwhile, the testator was under saline drips ie salt running through a tube attached and inserted to one of the arms for 28 January 1993 and 29 January 1993. On 29 January 1993, the testator was inserted with suppository through the anus to liquefy faeces. These facts and circumstances lead me to the irresistible conclusion that the testator did not have the testamentary capacity to make the will on 29 January 1993.

**[9]** He also found the said will to have been executed under dubious, nebulous and suspicious circumstances with the petitioner being the prime mover of its execution, instructing his advocate personal friend who was unknown to the deceased to prepare the will, requesting the two attesting witnesses to witness the will and causing them to sign backdated statutory declarations of that fact. The learned judge also held that the petitioner failed to prove that the thumbprint at the attesting clause was that of the testator. He thus declared the said will invalid and dismissed the petition with costs.

## LEGAL POSITION

**[10]** Before us, learned counsel for the appellant attacked the findings of the learned judge primarily on the two central issues ie whether the testator had testamentary capacity to execute the said will and whether there were suspicious circumstances surrounding the making of the will. These are findings of fact.

**[11]** It is trite that an appellate court will not readily interfere with the findings of fact made by the trial court which is tasked with the primary evaluation of evidence. The appellate court is however duty bound to intervene when there is such fundamental misdirection or lack of judicial appreciation of evidence by the trial court that no reasonable tribunal properly directed would have arrived at the same conclusion. See *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 (CA). The function of this court is merely to review the findings of primary facts though it may draw its own inferences from them. In evaluating credibility of witnesses it is always proper for the appellate court to defer to the views of the trial judge who had the audio-visual advantage.

**[12]** The law is that a testator must have testamentary capacity at the time when he executes the will. The burden always lies upon the person propounding the will to prove that the testator had testamentary capacity. The term 'testamentary capacity' is explained by Ismail Khan CJ (Borneo) in the Federal Court case of *Udham Singh v Indar Kaur* [1971] 2 MLJ 263 at p 265 as follows:

> A person has testamentary capacity when he understands the nature of his act and its effect; the extent of the property of which he is disposing; the claims to which he ought to give effect; and with a view to the latter object, no disorder of mind must poison his affections, prevent his sense of right, or prevent the exercise of his natural faculties, and no insane delusion must influence his will of disposing his property, and bring about a disposal of it, which if the mind had been sound, would not have been made (*Banks v Goodfellow* (1870) LR 5 QB 565).

**[13]** If a duly executed will is rational on the face of it a rebuttable presumption arises that the testator had testamentary capacity. As in the case of the English law our law is, and always has been, very strongly in favour of any will which in terms is not unreasonable and shows no sign of mental deficiency, and the law will not tolerate that it should be replaced or destroyed by any decision of the courts unless it is clear that the testator was incapable of making a proper will — see Langton J in *In The Estate of Bohrmann, Caesar and Watmough v Bohrmann* [1938] 1 All ER 271. Lord Goddard when delivering the advice of the Privy Council in *Judah v Isolyne Bose* AIR 1945 PC 174 held that the mere fact that the testator was unwell when she executed her will is a long way from saying that she had no testamentary capacity. The judgment of this court delivered by Gopal Sri Ram JCA in *Tho Yow Pew & Anor v Chua Kooi Hean* [2002] 4 MLJ 97; [2002] 4 CLJ 90 states the position as follows:

> Now the law upon the subject of a testator's testamentary capacity we find to be well settled. The decided cases in which wills have been held invalid for lack of testamentary capacity involve testators who were utterly insane either upon the finding of the probate court or by reason of an order appointing a committee on the ground of insanity of the testator.

**[14]** Suspicious circumstances in the context of wills relate to circumstances surrounding the making of the will, not circumstances surrounding the testamentary capacity of the testator. The propounder of a will must upon challenge being taken establish not only testamentary capacity but also dispel any suspicious circumstances surrounding the making of the will — see *Tho Yew Pew* at p 103 (MLJ); at p 96 (CLJ).

TESTAMENTARY CAPACITY

**[15]** In coming to his finding on testamentary capacity of the deceased the learned judge was alleged to have totally failed to consider that the evidence of the doctor PW4 was unchallenged. He erred in saying that PW4 was merely relying on memory and not on written record pertaining to any medical examination of the deceased. The finding that the deceased at the time of execution of the said will was suffering from constipation, diabetes, stroke, high blood pressure, under drips and the insertion of suppository is said to be contrary to evidence because the deceased only executed the said will ten days after his discharge from hospital on 18 January 1993 with his stroke, hyper tension and diabetes having stabilised. His subsequent admission on 28 January 1999 to 30 January 1993 was for constipation and urine problem which are totally different. There was no dispute that the deceased was unwell but the unchallenged evidence of PW4 shows that the medication given for the deceased did not affect his mental capacity to make a will. Though PW4 seems to remember that his memo was regarding

banking matters PW2's request for it was specifically for the purpose of the said will. The fact is that there is evidence from PW4 that the deceased was mentally alert and of sound mind on 29 January 1993 which the learned judge ignored in coming to his finding.

**[16]** On behalf of the respondents it was contended that PW4 did not examine the deceased before writing his memo that he was of sound mind and that the request for the memo was for the requirement of banking.

**[17]** The appellant's complaint that the learned judge's treatment of PW4's evidence is not without justification. The appeal records ('AR') show not less than three times he referred to his records when examined in chief. His testimony that the deceased was discharged having his treatment stabilised for his stroke, hyper tension and diabetes was not challenged. The admission on 28 January 1993 was only for severe constipation and inability to pass urine. The medications prescribed to him did not affect him mentally nor was evidence of any occurrence of mental lapses adduced. There is clear misappreciation of evidence relating to the deceased's mental condition at the time of execution of the said will.

**[18]** Whilst it may be true that PW4 did not examine the mental condition of the deceased before certifying in the memo that he was of sound mind, but he did ascertain that the deceased was aware of such request and acceded to it. This is PW4's answer when cross-examined on point:

> In the evening, after my ward round, I received a request from Sarah (PW1) for a document saying that the father was in a sound mind. I walked to the ward and asked him if he was aware of this. He said he was aware. I walked back to the counter to write this memo (see AR p 96).

Such is not the response of a testator who lacked mental capacity. Before that PW4 said:

> The request by Sarah was that she needed a letter to say that her father was in a fit state of mind to help him in some financial matters as he was unable to go to the bank. My response is to ask her father if he knew such a request was made. This was not in the presence of Sarah (see AR p 94).

**[19]** In any event the deceased's sanity was not in issue. PW4 who only prescibed medication for diabetes, blood pressure and blood circulation described the deceased's condition as follows:

> From my record, the patient was on a diabetes diet from 28.1.1993 to 30.1.1993. The four medications given to the patient did not affect the state of mind of the patient (see AR p 90).

A On 28.1.1993 and 29.1.1993 he was not given any drug to sedate him. During this period, the normal saline drips i.e. salt water was given to the patient (see AR p 90).

From my record, the patient did not suffer any loss of memory. On 29.1.1993, patient was under a sound state of mind (see AR p 91).

B None of the medicines caused drowsiness. The patient may not be physically sound to run, but he is of a normal mental state. He was mentally alert (see AR p 95).

C **[20]** The two attesting witnesses PW2 and PW3 found the deceased normal and could converse with them in English. The said will was read and translated by PW1 to the deceased in their presence and he acknowledged by nodding his head before affixing his thumbprint on each of the pages. This is what PW2 said in examination:

D ... Keadaan Hew Wai Keong adalah normal. Hew Wai Keong boleh berbual, dalam Bahasa Inggeris ... Sarah telah membaca surat wasiat dan kami telah menyemaknya. Sarah membaca kepada ayahnya En Hew dalam Bahasa Inggeris, kemudian Sarah terjemahkan ke dalam Bahasa Cina, saya tidak tahu sama ada Mandarin kerana saya tidak faham.

E Encik Hew Wai Keong menganggokkan kepalanya (see AR p 75–76).

PW3's version of the event is as follows:

... Pada masa itu En Hew Wai Keong adalah sihat. Saya berbual-bual dengannya dalam Bahasa Inggeris ... (see AR p 82).

F

Sarah beri satu salinan wasiat dan baca kepada En Hew Wai Keong. Ada 3 salinan wasiat. Sarah baca dalam Bahasa Inggeris dan dia terjemahkan kepada ayahnya dalam Bahasa Cina — saya tidak pasti dialek (loghat) (see AR p 82).

G Saya ingat En Hew Wai Keong yang telah menganggokkan kepalanya ... Selepas itu, En Hew melakukan thumb print di wasiat ... Saya melihat cap jari En Hew diturunkan (see AR p 82).

H **[21]** As opposed to these, neither the first respondent nor Hew Chee Keong visited the deceased in the hospital from 28 January 1993 to 30 January 1993. DW3 who looked after him in the hospital during the day only had this to say:

I Pada kali kedua, saya tak ingat sama ada doktor ada datang atau tidak. Pada masa itu, ayah saya tidur tiap-tiap hari. Sekiranya saya beri air, beliau tidak akan ambil sendiri. Saya perlu mengejutkan beliau. Oleh kerana ayah tidak berupaya menjaga diri sendiri, saya terpaksa menjaga beliau.

Pada hari kedua, ayah saya menggunakan 'drips' dan 'tiub' untuk membuang air kecil (see AR p 133).

DW4 only visited him at night and said:

> Saya tak boleh ingat bila dimasukkan ke Hospital pada kali kedua. Saya sentiasa melawat ayah pada waktu malam. Ayah saya tak berapa sihat. Dia perlukan bantuan orang. Dia tidak boleh kencing sendiri. Dia tidak berapa suka bercakap (see AR p 145).

The second respondent ('DW5') had nothing at all to say about the deceased's condition on 29 January 1993.

**[22]** The testimonies of PW4, PW2 and PW3 apart from PW1's coupled with DW4's admission that the deceased did inform her of the contents of the said will when she was nursing him after his discharge from hospital, provide unchallenged evidence that the deceased was of sound mind, memory and understanding and that he approved of and had knowledge of the contents of the said will when he executed it (see *Lee Tjin Nam v Lie Chin Man* [1996] 1 CLJ 82).

**[23]** The learned judge's finding on the deceased's testamentary capacity is obviously untenable being unsupported by and in fact contrary to evidence. He failed to appreciate that the execution of the said will was planned by the deceased. PW1 was not challenged when she said that it was the deceased's own idea to execute the said will in the hospital as he wanted to keep it a secret. This is fortified by the undisputed fact that the said will was prepared a few days before 29 January 1993. There is no basis whatsoever for the learned judge to arrive at his 'irresistible conclusion'. None of the medications prescribed had any effect on the deceased's mind, memory or understanding nor the saline drips or the suppository through the anus shown to affect his mental faculties. Applying Lord Goddard's advice, even if the deceased was bedridden on 29 January 1993 when he executed the said will, it is a long way from saying that he had no testamentary capacity. In the circumstances, this court had to interfere and correct the erroneous finding of the learned judge.

## SUSPICIOUS CIRCUMSTANCES

**[24]** The learned trial judge found suspicious circumstances in the following:

(1) The 'testator's usual solicitors had consistently been Messr Baharuddin, Bernatt, Tan, Ker and one Mr Tan Chek Yoke was consistently the attesting solicitor' while the said will was prepared by PW5 'an advocate and solicitor who was not one of the two attesting witnesses, unlike the two previous wills'.

(2) The said will 'was prepared by an advocate and solicitor who is a personal friend of the petitioner, but there is no evidence to the effect that the advocate and solicitor was ever known to the testator'.

(3) The petitioner was 'undoubtedly and unambiguously the prime mover' of the said will as she was the one who instructed her personal friend PW5 to prepare it and had two personal friends (strangers to the deceased) as the attesting witnesses. She also caused the witnesses to sign two statutory declarations which were backdated on her instruction.

(4) 'The change of the testator's usual solicitors to the new solicitor who has never spoken to the testator regarding the disposition of his assets in the will is a bizarre situation'.

(5) The petitioner takes a substantial benefit under the said will.

**[25]** It is common ground that the deceased had made two previous wills in 1988 both prepared by Messrs Baharuddin Bernatt, Tan and Ker. It is in fact the respondents' case that the deceased also executed another will between July and August 1992 at the office of Tetuan Azman Davidson & Co (see para 6 of the first respondent's affidavit and para 4 of Hew Chee Keong's affidavit). PW5 confirmed that he was practising under Tetuan Azman Davidson & Co in 1992 and 1993 and the said will was prepared by him. The first respondent admitted that the deceased executed the 1992 will in PW5's office in July 1992. DW3 also admitted that the deceased took her to PW5's office to make one of his wills. These evidence and admission totally demolished the learned judge's first, second and fourth premises.

**[26]** There is nothing bizarre about a man wanting to change his will after the death of his beneficiary wife. It was not disputed that the deceased had destroyed both his 1988 wills. It was also not disputed that the 1992 will was also destroyed on his instruction. The finding of the learned judge is clearly based on false premises and contrary to undisputed evidence. Reliance on *Battan Singh v Amirchand* [1948] 1 All ER 152 is therefore totally misplaced as the facts differ.

**[27]** The learned judge's findings that the petitioner was the prime mover of the execution of the will and that her acts and conduct constituted dubious, devious, nebulous and suspicious circumstances are also based on his misappreciation of facts adduced in evidence. From the contemporaneous documents he executed, it is apparent that the deceased reacted to events that affected his personal life. He executed the first 1988 will consequent to the family quarrel in March 1988 which led him and his wife to move out of their Serdang Baru house to stay with DW4. Hence, the offending son Hew Chee Keong was only given RM500 out of his estate which included eight houses under development. He allotted five of the houses to each of his

daughters specifically identifying the corner lot for DW4. Of the other three houses, one was to be shared by the petitioner and sister Hew Lee Choo, while the remaining two to be shared by the other three daughters and the three grandsons. The second 1988 will appears to coincide with his moving out of DW4's house and the purchase of the house bought for him by the petitioner and Hew Lee Choo. We can only speculate the cause of the change in the will but DW4 lost her corner lot to Hew Lee Choo and the grandsons now stood to gain one house each while Hew Chee Keong's entitlement remained the same.

**[28]** In 1992 the deceased was diagnosed with cancer in April or May. In July 1992 he took DW3 with him to PW5's office to make another will. The petitioner admitted that the 1992 will was executed in the lawyers' office but it was destroyed on the deceased's instruction after the execution of the said will. Though the contents of the 1992 will were not disclosed that will effectively revoked the 1988 will.

**[29]** After his wife died in October 1992 the deceased executed a power of attorney dated 3 November 1992 in the petitioner's favour empowering her to deal with all his assets and properties. This reflection of trust was admitted by DW3 when she said:

> Ayah saya selalu berunding dengan Sarah Abdullah kerana beliau berpelajaran tinggi dan beliau adalah bumiputra (Muslim?) dan kerja adalah lebih mudah sekiranya beliau berunding dengannya.

It is significant that the power of attorney was not prepared by the 1988 or 1992 solicitors but by the legal firm of Tengku Mohamed, Achan & Lim with one Leong Chee Chung as attesting solicitor. On the deceased's instruction the petitioner did on 16 January 1992 withdraw monies from fixed deposits to pay various people including herself and for medical expenses earlier solely borne by her.

**[30]** The deceased was admitted to Tung Shin Hospital on 8 January 1993 and was discharged just before the Chinese New Year on 18 January 1993. That was when the first respondent's favour was sought and was allegedly refused which upset and angered the deceased. It was after the acupuncture incident and a few days before 29 January 1993 that the deceased asked the petitioner to get PW5 to prepare the said will according to his instructions.

**[31]** It is not odd for the deceased to cut the first respondent out of his will as he did the same to his own son Hew Chee Keong earlier. The first respondent may stand to lose the house allotted to her in the earlier will but

DW3 and DW4 retain their houses as also the petitioner and Hew Lee Choo their one and a half house each all now identified by their lot numbers. The biological daughters DW3, the petitioner and Hew Lee Choo also share the Serdang Baru house earlier allotted to the grandchildren. Two houses are to be sold to pay the deceased's medical expenses. DW3 and DW4 further enjoy a RM500 bequest each as do the first respondent and Hew Chew Keong. There is thus nothing unreasonable about the division of the deceased's properties under the said will. It is in fact very rational.

**[32]** It was the deceased's idea to execute the said will at the hospital and to keep it a secret. The fact that he had an appointment with PW4 on 28 January 1993 was not denied. It was also the deceased's wish that the said will be executed with his thumbprint after assuring the petitioner that it would be valid as also confirmed by PW5. The attestation clause in the said will is evidence of this. The said will was thus executed at the hospital on 29 January 1993 after the deceased's admission a day earlier and only in the presence of the attesting witnesses PW2 (a relative of the petitioner's husband) and PW3 (a colleague of the petitioner) who both confirmed that they conversed with the deceased in English before the execution. Issue was taken that the deceased could not speak or understand English but the evidence shows that official letters to him and all previous wills were also in English with no evidence of any of them being translated to him. The fact that he could tell DW4 the contents of the said will should not be ignored. Preference to speak in one's mother tongue cannot be equated with inability to understand English. According to the petitioner, the deceased told her that the house meant to be given to the petitioner's mother was at her request put in the first respondent's name in the previous wills. The house was never meant for the first respondent as there was no blood relation between them coupled with the fact that she refused to allow him to stay in her house and they were never close.

**[33]** The above chronology leading to the execution of the said will should allay any suspicion that it was not executed by the deceased voluntarily and with full understanding of its contents. He made his will and changed his will as and when he felt the need to do so. Far from being the prime mover of the execution of the said will, the petitioner, having been entrusted by her father, was merely abiding by his specific instructions. Having executed the 1992 will before PW5 six months earlier, it was only natural for the deceased to instruct the petitioner to get him to prepare the said will. There is nothing suspicious about the petitioner getting PW2 and PW3 to attest the said will. One cannot reasonably expect the petitioner to call total strangers as witnesses. What is unquestionable is that secrecy was maintained and they have no interest in the matter. As for the statutory declarations they are irrelevant to the execution of the said will though they corroborate PW2 and

PW3 by being consistent with their testimonies. The learned judge also erred in finding that the petitioner takes a substantional benefit under the said will because she in fact gets less than what is due to Hew Lee Choo who retains the corner lot with extra land given to her under the second 1988 will.

**[34]** In all the above circumstances there is nothing dubious, devious, nebulous or suspicious about the acts and conduct of the petitioner leading to the execution of the said will. The learned judge clearly misdirected himself in so finding in the face of evidence to the contrary which he totally ignored or misconstrued.

EXECUTION OF THE SAID WILL

**[35]** Echoing the further finding of the learned judge, it was submitted on the respondent's behalf that the petitioner failed to prove that the said will was executed by the deceased on ground that for a valid will under s 5 of the Wills Act 1959 the deceased's thumbprint should at least be at the attestation clause. The thumbprint expert could not identify the thumbprints on pp 2–6 of the said will as that of the deceased.

**[36]** This is a perverted finding. The failure of the expert to identify the thumbprint on p 6 of the said will does not negate the fact that it was the deceased's thumbprint. There is incontrovertible evidence from the petitioner, PW2 and PW3 that the deceased affixed his thumbprint on all six pages of the said will. When the expert positively identified the thumbprint on the first page to be that of the deceased it logically follows that the other thumbprints must also be his. The failure to identify was because of insufficient characteristics and not because it was not his.

CONCLUSION

**[37]** For the aforesaid reasons we could not possibly uphold the decision of the learned trial judge. We felt duty bound to intervene. We had to rectify the error as the whole evaluation of evidence by the learned judge was totally flawed. With the terms of the said will not being unreasonable and there being no evidence of mental deficiency on the part of the deceased who executed it, the rebuttable presumption of a duly executed and valid will is not displaced. There is no cause for probate to be denied. The appeal was therefore allowed the order of the High Court set aside and probate granted to the petitioner.

*Appeal allowed with costs here and below.*

Reported by Kohila Nesan